UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SHIRLEY L. PHELPS-ROPER, *et al.*,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:09-cv-1298-CDP
	)	
CITY OF MANCHESTER, MISSOURI,	)	
	)	
Defendant.	)	

Plaintiffs' Reply to Defendant's Response to
Plaintiffs' Second Statement of Uncontroverted Material Facts

With their second motion for summary judgment, Plaintiffs filed a statement of uncontroverted material facts. (Doc. # 29). Defendants have responded. (Doc. 44-1). Plaintiffs submit this reply:

1. As to ¶ 3 of the Plaintiffs' Second Statement of Uncontrovered Material Facts, Plaintiffs dispute Defendant's conclusion that "others engage in violent activity towards Plaintiffs and their co-religionists, and so violence does attend Plaintiffs' protests." Plaintiff Shirley Phelps-Roper testified to one actual incident of violence—at a protest of a restaurant seventeen years ago; neither Plaintiff was participating in the protest. Deposition of Shirley Phelps-Roper, attached hereto as Ex. G at 48-51. She further described being spat upon and having items thrown at her, but did not categorize those incidents as "violence." *Id.* Plaintiffs have conducted thousands of pickets, and it is an inaccurate reflection of the record to suggest that they are generally or regularly attended by violence.

As to the third sentence of ¶ 3, Manchester denies, without contrary evidence, that Plaintiffs' protests are not disruptive. Plaintiffs' assertions are made based upon personal knowledge of their experience being present at thousands of pickets. Because the denial is made without offering any evidence in support, it should be deemed admitted.

2. As to ¶ 5, Manchester's denial of the purpose of the ordinance is made without any evidence showing a different purpose. It also fails to address Manchester's City Attorney's public statement that Plaintiffs are "the persons against whom [the funeral picket] provision were initially drafted[.]" Doc. 29-3 at 18. In the absence of any contrary evidence supporting the denial, the statement should be deemed admitted.

Plaintiffs dispute Manchester's assertion that "Plaintiff Shirley Phelps-Roper admits that the ordinance does not apply just to Plaintiffs or their message." In fact, Plaintiff admitted the ordinance "could" be applied to a protest conducted by Manchester's counsel in this case; she added, "Alice lives over there in that land though." Ex. G at 80-81. In addition, in another portion of her deposition when asked if the ordinance would "on its face equally to [Manchester's counsel] as it would to [Plaintiffs'] message," Plaintiff Shirley Phelps-Roper denied the assertion. *Id.* at 78-79. She responded, "[I]f you're sitting over there and you're thinking this through, you might say that it would, but if you have some experience, like we have, then you would know that when the rubber meets the road, that's not what happens." *Id.* at 79.

3. As to ¶ 6, to the extent Manchester denies it would enforce the challenged ordinance or that Plaintiffs would face the punishment allowed by ordinance for a

violation, Manchester provides no evidence in support of its denial; accordingly, the statement should be deemed admitted.

4. As to ¶ 7, the purported admissions of Plaintiff Shirley Phelps-Roper are inaccurate. Contrary to Manchester's citation to page eighty of her deposition, she does not admit that the ordinance is content-neutral. She admitted the ordinance "could" be applied to a protest conducted by Manchester's counsel in this case; she added, "Alice lives over there in that land though." Ex. G at 80-81.

Plaintiffs also disputes the assertion that Shirley Phelps-Roper did not first learn of Manchester's ordinance until January 2009. As explained in their opposition to Manchester's Motion for Summary Judgment, Doc. # 46 at 2-3, which is incorporated herein by reference, she first learned of the ordinance shortly after its passage.

5. As to ¶ 8, Plaintiffs object to Manchester's effort to strike their affidavits. In their affidavits Plaintiffs describe their pickets, identify Manchester's ordinances, and explain that because of the ordinances, Plaintiffs do not conduct pickets of funerals or memorial services in the City of Manchester. This is more than a mere conclusory statement. As further explained at depositions, the fear of picketing in Manchester was "based on the fact that they went to the extra length to add an ordinance, and based on how the municipalities were behaving in a similar fashion; coming at us with a common scheme to violate our right to stand there. And I'm not interested in being their guinea pig. I'm not interested in having my liberties experimented with … or my children's welfare experimented with." Ex. G at 26-27. The balance of Manchester's denial is based on

misleading characterizations of the evidence, including taking statement out of context, as explained in Plaintiffs' opposition to Manchester's Motion for Summary Judgment, which is incorporated herein by reference.

6. As to ¶ 9, Manchester's further statement of facts is misleading as explained in ¶¶ 5-7 of Plaintiffs' opposition to Manchester's Motion for Summary Judgment, at pp. 3-4, which is incorporated herein by reference.

7. As to ¶ 13, Manchester's asserts should be rejected for the same reasons explained in ¶ 5, *supra.*

8. As to ¶ 16, Manchester misstates the evidence. Plaintiffs have made clear that once they became aware of Manchester's ordinance, they did not look for or consider picketing at any funeral held in the City of Manchester. Accordingly, there is no evidence whether there were protests that were held in Manchester that Plaintiffs might have wanted to picket if not for the ordinance. (And there is evidence of two funerals that did not wind up being held in Manchester but that Plaintiffs did not picket because of the ordinance.) Moreover, there is no evidence demonstrating that Plaintiffs "would face substantial logistical hurdles in mounting a protest" in the City of Manchester.

9. To the extent that Manchester incorporates its Statement of Uncontroverted Material Facts, Plaintiffs incorporate by reference their responses to the statement as contain in their opposition to Manchester's Motion for Summary Judgment.

Respectfully submitted,

/s/ Anthony E. Rothert

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2010, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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